

Federal Law Prohibiting Pre-Dispute Arbitration of Sexual Harassment and Sexual Assault Claims Not Retroactive, New Jersey Court Confirms

Law and the Workplace Blog on **December 5, 2022**

A new federal law invalidating pre-dispute arbitration agreements for sexual harassment and sexual assault claims does not apply retroactively, a New Jersey appeals court recently confirmed.

In [Zuluaga v. Altice USA \(N.J. App. Div. Nov. 29, 2022\)](#), the plaintiff had signed an arbitration agreement waiving her right to bring employment-related disputes in court when she joined her employer, Altice USA, in November 2020. In October 2021, the plaintiff sued Altice for sexual harassment and constructive discharge claims under the New Jersey Law Against Discrimination (“NJLAD”).

The Appellate Division affirmed the lower court’s order compelling arbitration based on the parties’ arbitration agreement. The appeals court rejected the plaintiff’s argument that the recently enacted Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”) invalidated her arbitration agreement.

The EFAA, which we covered in detail [here](#), invalidates pre-dispute arbitration agreements that preclude an individual from bringing sexual harassment or sexual assault claims in court. The law went into effect immediately upon its enactment on March 3, 2022. Because the court found the plaintiff’s sexual harassment claim accrued no later than October 27, 2021 (when she filed her lawsuit), the EFAA would have to apply retroactively in order to apply to the plaintiff’s claim.

However, the Appellate Division pointed out that the plain text of the EFAA makes clear that the law is not retroactive by stating, “This Act, and the amendments made by this Act, shall apply with respect to *any dispute or claim that arises or accrues on or after the date of enactment of this Act*” (emphasis added). The court also held that the EFAA’s non-retroactivity still controls even when, as in this case, the arbitration proceedings have not yet taken place, so long as the claim itself accrued pre-enactment.

Section 12.7 of the NJLAD states that provisions in employment contracts that waive substantive or procedural rights related to discrimination, retaliation, or harassment claims are against public policy and unenforceable. However, the Appellate Division found that the Federal Arbitration Act (“FAA”) preempts this section of the NJLAD. While the plaintiff also argued that the EFAA’s passage eliminated this FAA preemption, the court disagreed, finding that any effect the EFAA had on FAA preemption of state law would also only apply post-March 3, 2022.

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